NORDIN ATAN & ANOR

v.

PP

HIGH COURT SABAH & SARAWAK, TAWAU
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: T(42) 34 OF 1998]
24 NOVEMBER 1999

EVIDENCE: *Accomplice - Whether witness is - Whether conviction could be based on evidence of witness - Whether evidence sufficiently corroborated - Evidence of wife of witness - Whether credible*

EVIDENCE: *Witness - Failure of prosecution to call witnesses - Whether an adverse inference - Evidence Act 1956, s. 114(g)*

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Corruption - Offenders police officers - Whether sentences imposed too lenient*

The appellants were convicted under ss. 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961 in the Sessions Court below. Hence, the instant appeal. The prosecution cross appealed against the inadequacy of the sentences passed upon them.

The appellants who were police officers, were found to have taken a sum of money from one, Yusuf Kassim, the complainant in this case ('PW2'), as an inducement not to take an action against him for possession of stolen goods.

The issues were: (i) whether PW2 was an accomplice and the Sessions Court judge ('SCJ') erred in law by convicting the appellants on the uncorroborated pieces of evidence of PW2; (ii) whether there was a misdirection in law when the SCJ accepted the testimony of PW3, who was the wife of PW2; (iii) whether the evidence of PW2 should be disregarded due to his possible motive of revenge as he had been apprehended once before by the appellants on an immigration matter; (iv) whether s. 114(g) of the Evidence Act 1956 should be invoked as the prosecution failed to call certain witnesses.

Held:

[1] Based on the evidence adduced, the SCJ was correct in finding that PW2 was not an accomplice and even if he was, there was ample evidence to corroborate his evidence. PW2 was also not a volunteer. He was obviously under pressure from the appellants to meet their demand. Thus, there was no justification for the appellants' contention that he was an inciter and abettor.

[2] This court being an appellate court was not in a position to interfere with the finding of the SCJ that PW2 was a truthful and consistent witness since PW2 was not seen in the witness box this instance. As such, the finding of the SCJ was a correct assessment of PW2. The true test of whether to accept or reject the evidence of a witness is to consider the consistency of the story itself, how it stands whilst under cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case.

[3] Just because a witness happens to be related to a complainant does not make the evidence of that witness less credible unless there is good reason to do so. Also, an appellate court should give due consideration to the appreciation of the witnesses by the trial court.

[3a] There was no misdirection in law in respect of the SCJ's acceptance of the testimony of PW3, the wife of PW2. Further, the evidence of PW2 was sufficiently corroborated and there was strong circumstantial evidence for the prosecution case. As regards the tape recordings of the telephone conversations between PW2 and the 2nd appellant, there was no fault in the conclusion of the SCJ admitting them and adducing inferences or finding of facts from them.

[5] The mere arrest of PW2 earlier in an immigration matter did not make his credibility doubtful *per se*. As to the assessment of the evidence by the SCJ, this court as an appellate court should be slow to interfere lest it be taken as an usurpation of the function of the trial court.

[6] Section 114(g) of the Evidence Act 1956 is not invoked in all cases of failure or omission to produce or adduce evidence. It is only invoked in cases where there has been an intentional suppression of material or crucial evidence. Thus, it depends on the facts and circumstances of each case and it is not a general rule that any failure or omission would attract the application of the said section. Further, the calling of witnesses in any prosecution is within the discretion of the public prosecutor.

[6a] The uncalled witnesses were not essential to the prosecution case. If the defence believed that these witnesses would have given evidence not favourable to the prosecution, then the defence should have accepted them when they were offered by the prosecution.

[7] Whilst the SCJ did state the reasons for the need of custodial sentence to be imposed, the actual punishment handed down did not reflect the intended purpose. Public interest should be taken into account when

determining not only the nature of punishment to be imposed but also the length of custodial term if it is to be imposed. No actual consideration was given by the SCJ on that aspect.

[7a] The sentences imposed were manifestly inadequate in view of the fact that corruption was a serious offence. More so as the offenders were supposed to enforce the law and not take advantage of their positions.

[Appeal against convictions dismissed; cross-appeal against inadequacy of sentences allowed.]

Case(s) referred to:
Abu Bakar Alif v. R [1953] MLJ 19 ***(refd)***
Ashmore v. Corp of Lloyd's (HL (E)) [1992] 1 WLR 446 ***(refd)***
Balasingham v. PP [1959] MLJ 193 ***(refd)***
Bhojraj v. Sitaram [1936] AIR 60 ***(refd)***
Davies v. Director of PP [1954] 1 All ER 507 ***(refd)***
Lim Kheak Teong v. PP [1985] 1 MLJ 38 ***(refd)***
Mohamed Mokhtar v. PP [1972] 1 MLJ 122 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(refd)***
PP v. Mansor Mohd Rashid & Anor [1996] 3 MLJ 560 ***(refd)***
Periasamy Sinnappan & Anor v. PP [1996] 2 MLJ 557 ***(refd)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(refd)***
R v. Ball 35 Cr App R 164 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 133, 114(g)

For the appellants - Liew Chiew Chai; M/s CC Liew & Co
For the respondent - Ahmad Bachee, DPP

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum J:

Introduction

This is an appeal by both the appellants against their convictions on charges under the Prevention of Corruption Act 1961 (PCA). There were three charges preferred against the appellants with two charges against both while the third was against the 2nd appellant only. The appellants were convicted on 10 December 1998 by the learned Sessions Court Judge Tawau (SCJ) on all the charges and sentenced as follows:

(a) for the 1st charge both the appellants were sentenced to a fine of RM500 each in default one week imprisonment and one week imprisonment;

(b) for the 2nd charge both the appellants were sentenced to a fine of RM1,000 each in default two weeks imprisonment and one week imprisonment;

(c) for the 3rd charge the 2nd appellant was sentenced to a fine of RM500 in default one week imprisonment and one week imprisonment.

The terms of imprisonment were ordered to run concurrently.

There is also a cross-appeal by the prosecution against the inadequacy of the sentences passed upon the appellants.

I will deal first the appeal by the appellants against their convictions.

Appeal Against Convictions

The charges preferred against the appellants read as follows:

1st Charge: (against both the appellants)

> Bahawa kamu berdua secara bersama pada 25hb Februari 1997 jam lebih kurang 7.30 malam ketika dalam kereta semasa dalam perjalanan ke Ibu Pejabat Polis Daerah Lahad Datu di dalam Daerah Lahad Datu di dalam Negeri Sabah, secara rasuah, memujukrayu untuk diri kamu berdua suatu suapan iaitu wang RM5,000.00 daripada Yusof Bin Kassim sebagai suatu dorongan kepada kamu berdua sebagai agen Kerajaan Malaysia, iaitu anggota Polis Di Raja Malaysia yang bertugas di Jabatan Siasatan Jenayah Ibu Pejabat Polis Daerah Polis Daerah Lahad Datu, untuk tidak melakukan suatu perbuatan yang berhubung dengan hal ehwal prinsipal kamu, iaitu, tidak mengambil tindakan lanjut terhadap Yusof Bin Kassim yang dikatakan terlibat dalam melakukan kesalahan membeli dan menyimpan barang curi, iaitu, telefon bimbit jenis Ericsson No. Siri A5101 Y5 C64 dan dengan itu kamu berdua telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 3(a)(ii) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia Akta No. 57).

2nd Charge: (against both the appellants)

> Bahawa kamu berdua secara bersama pada 25hb Februari 1997 antara jam 7.30 malam hingga 9.00 malam di Ibu Pejabat Polis Daerah Lahad Datu, di dalam Daerah Lahad Datu di dalam Negeri Sabah, sebagai agen kepada Kerajaan Malaysia, iaitu, anggota Polis Di Raja Malaysia di Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Lahad Datu telah secara rasuah bersetuju menerima suatu suapan untuk diri kamu berdua, iaitu, wang RM5000.00 daripada Yusof Bin Kassim sebagai dorongan kepada kamu berdua untuk tidak melakukan suatu perbuatan yang berhubung dengan hal ehwal prinsipal kamu, iaitu, tidak

mengambil tindakan lanjut terhadap Yusof Bin Kassim yang dikatakan terlibat dalam melakukan kesalahan membeli dan menyimpan barang curi, iaitu, telefon bimbit jenis Ericsson No. Siri A5101 Y5 C64 dan dengan itu kamu berdua telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia Akta No. 57).

3rd Charge (against the 2nd appellant)

Bahawa kamu pada 28hb Februari 1997 jam lebih kurang 2.30 petang di dalam Daerah Lahad Datu di dalam Negeri Sabah, sebagai agen Kerajaan Malaysia, iaitu, anggota Polis Di Raja di Jabatan Siasatan Jenayah, Ibu Pejabat Polis Daerah Lahad Datu telah secara rasuah bersetuju menerima suatu suapan untuk diri kamu, iaitu, wang RM3000.00 daripada Yusof Bin Kassim sebagai dorongan kepada kamu untuk tidak melakukan suatu perbuatan yang berhubung dengan hal ehwal prinsipal kamu, iaitu, tidak mengambil tindakan lanjut terhadap Yusof Bin Kassim yang dikatakan terlibat dalam melakukan kesalahan membeli dan menyimpan barang curi, iaitu, telefon bimbit jenis Ericsson No. Siri A5101 Y5 C64 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia Akta No. 57).

Against all the convictions the appellants submitted 18 grounds of appeal. But in his submissions learned counsel for the appellants categorized the grounds into seven groups, namely,:

(i) Ground 1;

(ii) Grounds 2, 3 , 4 and 5;

(iii) Grounds 6, 8, 9 and 10;

(iv) Ground 7;

(v) Ground 11;

(vi) Ground 12; and

(vii) Grounds 14, 15, 16 and 17.

There was no submission for Ground 18.

(i) Ground 1

It reads:

1. The learned Sessions Court Judge erred in law by failing to warn herself of the danger of convicting on the following uncorroborated pieces of evidence of the complainant (PW2):

a) The learned Sessions Court Judge accepted the evidence of the complainant (PW2) that on the night of 25.02.1997 while inside the car on the way to the police station Lahad Datu both the 1st and

2nd Accused simultaneously solicited for RM5,000.00 from the complainant (PW2). This evidence was not corroborated by any other evidence because no other person besides the 1st and 2nd accused and the complainant (PW2) was in the car;

b) The learned Sessions Court Judge accepted the evidence of the complainant (PW2) that while inside the CID office on 25.02.1997 both the 1st and 2nd accused asked him to get RM5,000.00 by 9.15 pm. This evidence was not corroborated by any other evidence, and

c) The learned Sessions Court Judge accepted the uncorroborated evidence of the complainant (PW2) that on 25.02.1997 at 9.25 pm the 1st and 2nd accused rearrested the complainant (PW2) and brought him to the Lahad Datu police station where they extended the time until 10.15 pm for him to find the RM5,000.00."

This ground is basically on the issue that the complainant Yousaf Kasim (PW2) was an accomplice and therefore his evidence required corroboration or else the learned SCJ should have warned herself of the danger of accepting the evidence of PW2 without corroboration and thereafter convicting the appellants on such uncorroborated evidence.

It is the contention of learned counsel for the appellants that PW2 was an accomplice in that he was a *particeps criminis* and relied on the case of *Davies v. Director of PP* [1954] 1 All ER 507. And the reason for the learned counsel in branding PW2 an accomplice is based on the fact that he assisted the Badan Pencegah Rasuah (BPR) to 'frame two individuals allegedly to be the appellants'. It was also submitted that PW2 obtained RM3,000 from BPR as 'bait of gratification to hook the appellants for the offence of corruptly accepting gratification.' Learned counsel said that PW2 was an inciter and abettor.

In respond to the above contention the learned deputy public prosecutor submitted that to convict on accomplice evidence per se is not illegal as s. 133 of the Evidence Act 1950 (the Act) allows it. The only requirement as propounded by judicial decisions is that a trial court should warn itself of the danger of convicting an accused person on an uncorroborated evidence of an accomplice. And the learned deputy went on to say that where a trial court as in this instant case did not find a witness to be an accomplice there should be no question of his evidence requiring corroboration. It was also submitted that where a complainant had not much of a choice in paying gratification his evidence would be less seriously discredited than the one who voluntarily agreed to pay.

Now, the crucial question is whether PW2 was an accomplice in the whole episode. The learned SCJ found that he was not and even if he was, there

were ample evidence to corroborate his evidence. Was she justified to come to such a decision? Having carefully examined the evidence adduced in this case as a whole, in particular, the role of PW2 I am inclined to agree with the finding of the learned SCJ. This is not a case of where PW2 voluntarily offered the gratification. From the evidence the ball was set rolling by the appellants themselves when they demanded payment. Of course it can also be said that the so-called 'demand' was the creation of PW2 himself. But that may be possible if not for the other damning evidence adduced in the course of the trial. For instance, there is no dispute that the appellants picked up PW2 on the night of 25 February 1997 in connection with a stolen hand-phone set. There was also no doubt that the appellants managed to secured the alleged stolen hand-phone from the house of PW2. And it is in evidence that the appellants were instructed to look for the stolen hand-phone set by their superior, Inspector Tan Boon Sing (PW5). There is also no dispute that having recovered the set the appellants did not inform their superior of the seizure as soon as possible. Instead it was kept in the house of the 1st appellant and was only surrendered to BPR in connection with the present case. The explanation of the 1st appellant for such a conduct was that further investigation had to be carried out in a day or two if there was opportunity. Obviously there was more to it than what was explained by the 1st appellant since it was required or at least expected by their superior that the seizure should be reported. So I do not think it can be said that the 'demand' was a figment of imagination of PW2 in his quest to frame up the appellants. In my view it cannot be said that PW2 was a volunteer. He was obviously under pressure from the appellants to meet their demand. To say now that he was an accomplice in the crime that was hatched by the appellants themselves would be quite far-fetched. This case in not dissimilar to the case of *Mohamed Mokhtar v. PP* [1972] 1 MLJ 122 where Sharma J said:

> I am unable to say how PW12 can, by any stretch of imagination, be called an accomplice. At the most he may be called a trap witness. The whole object of the Prevention of Corruption Act would be nullified if any public-spirited person decided to go to the Anti-Corruption Agency to tell them that a public officer had demanded a bribe from him and if as a result of his information to the Anti-Corruption Agency a trap was set against the officer in question by asking the member of the public to go and pay the bribe demanded to the said officer. Corroboration of the testimony of a trap witness is no doubt desirable and it is not safe to convict the accused in the absence of that corroboration. I entirely accept that proposition. In this case, however, the evidence was so clearly against the accused that no court using the standards of any reasonable man could possibly have come to any other inference except the clear guilt of the accused. The evidence discloses a long process of preparation for the commission of the offence. It was in fact the appellant who had hatched a plan to get the money out of PW12. Unfortunately for him that

plan turned out to be a trap into which he himself fell. There were demands on the part of the appellant. There was refusal on his part to do anything for PW12 unless money was paid to him.

I find therefore no justification to say that PW2 was an inciter and abettor in this case.

It must also be noted that the learned SCJ found PW2 to be a truthful and consistent witness even after a vigorous cross-examination. To that this court being an appellate court is not in the position to interfere since I have not seen the witness in the witness box. (see: *Periasamy s/o Sinnappan & Anor v. PP* [1996] 2 MLJ 557 CA). As such that finding should be accepted as correct assessment of PW2. After all the true test of whether to accept or reject the evidence of a witness is to consider consistency of the story itself, how it stands whilst under cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. (see: *Bhojraj v. Sitaram* [1936] AIR 60 PC cited in *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1). In short it is the probability or improbability of the story viewed in the light of the evidence of the case as a whole.

And as correctly pointed out by the learned deputy that the learned SCJ was careful enough to state that even if PW2 was an accomplice there were ample corroborative evidence available. I have already mentioned a few herein above. The other glaring evidence is the tape-recording conversations. This of course is also a subject of dispute by the appellants and I will deal with it in due course.

Accordingly I find no merit in this ground 1 of the appeal.

(ii) Grounds 2, 3, 4 & 5

They read:

2. The learned Sessions Court Judge erred in law and in fact in finding that the evidence of the complainant PW2 was corroborated by his wife Salmidah Palmaany (PW3). PW3 had no personal knowledge of the alleged soliciting for RM5,000.00 by the 1st and 2nd accused. She only heard about the alleged soliciting for RM5,000.00 from her husband hearsay PW2;

3. The learned Sessions Court Judge erred in law and in fact in finding that the evidence of the complainant PW2 was corroborated by the evidence of Yunus PW4;

4. The learned Sessions Court Judge erred in law and in fact that the evidence of the complainant (PW2) was corroborated by the evidence of Inspector Tan PW5;

5. The learned Sessions Court Judge erred in law and in fact that the evidence of the complainant (PW2) was corroborated by the evidence P12-P19.

These grounds relate to the evidence which the learned SCJ took as corroborative evidence to the testimony of PW2. It was the submission of learned counsel for the appellants that such evidence should not have been admitted as they were either coming from an interested witness, hearsay or the identity of the voice being uncertain. And learned counsel identified such testimonies as those of Salmidah Palmaany (PW3), Mohd. Yunus Chauleng (PW4) and PW5. The exh. P.12 to exh. P.19 (the tapes recording the telephone conversations) were also doubted as having any weight as corroborative evidence.

Learned deputy on the other hand argued that the conclusions arrived at by the learned SCJ on the respective witnesses are finding of facts. It was also submitted that the fact that PW3 is the wife of PW2 should not make her evidence less believable unless there is cogent reason to do so.

It is trite law that an appellate court should be slow in interfering with any finding of facts by a trial court. (see: *PP v. Wan Razali Kassim* [1970] 2 MLJ 79). Further just because a witness happens to be related to a complainant does not make the evidence of that witness less credible unless there is good reason to do so. (see: *Balasingham v. PP* [1959] MLJ 193).

It is also the law that an appellate court should give due consideration to the appreciation of the witnesses by the trial court. (see: *Lim Kheak Teong v. PP* [1985] 1 MLJ 38).

Now, in respect of PW3 no doubt she is the wife of PW2 the complainant. But having heard her version of the event and having seen her in the witness box the learned SCJ accepted her testimony. And having read her reasoning I did not find any misdirection in law as to render such finding flawed. And as regards the piece of paper on which the number of the hand-phone of the 2nd appellant was written (exh. P.11) PW3 asserted that the 2nd appellant gave it. There was no objection coming from the defence when it was tendered as an exhibit. Indeed in cross-examination it was put to PW3 that exh. P.11 was not given by the 2nd appellant which she disagreed. The learned SCJ discussed the evidence of PW3 *vis-a-vis* evidence of the 2nd appellant and came to the conclusion that the latter's version was very unlikely. I also found no misdirection in law in such a finding and in my view justified. There was not an iota of other evidence (other than the denial of the 2nd appellant) adduced by the appellants to contradict the version of PW3 on the giving of the telephone number. There was nothing to indicate that they could have been framed up. And it would be most improbable for anyone to have known the

fact that the appellants had seized one stolen hand-phone from PW2 earlier saves the appellants themselves. Hence, there is no basis to say that the evidence of PW3 could not corroborate the testimony of PW2.

Similarly, the evidence of PW4 and PW5 were also properly dealt with by the learned SCJ. In respect of the testimony of PW4 it might not be directly connected to the offences for which the appellants were charged and convicted. But I agree that his evidence provided the independent testimony that indeed PW2 was in desperate need for money that night. For whatever the reason is another matter. And the evidence of PW5 also served another independent evidence though circumstantial it may be. These evidences of PW3, PW4 and PW5 in my view not only corroborated the version of PW2 in the episode but also gave the strong circumstantial evidence for the prosecution case.

As regards the tape recordings of the telephone conversations between PW2 and the 2nd appellant I also found no fault in the conclusion of the learned SCJ in admitting them and adducing inferences or finding of facts therefrom. The basic complaint of learned counsel for the appellants is that there was no proper identification of the voices at the other end when the recordings were done. With respect such a contention arose on the premise that the evidence of PW2 should not be believed at all. In view of the finding of the learned SCJ on the evidence of PW2, which I found no reason to interfere, such assertion of learned counsel holds no or very little probability.

Accordingly, I find no merit in the grounds 2, 3, 4 and 5 of this appeal.

(iii) Grounds 6, 8, 9 & 10

They read:

> 6. The learned Sessions Court Judge erred in law by failing to consider the relevant evidence that the complainant (PW2) and the BPR officers twice laid traps for the 1st and 2nd accused to collect the RM5,000.00 but failed in both occasions;
>
> 8. The learned Sessions Court Judge erred in law by failing to consider the relevant evidence of DW1 and DW2 that they did not on the night of 25.02.1997 bring the complainant PW.2 into the CID office and that they brought him to the enquiry counter to check whether any report had been lodged against him and that they let him go when they found that no report had been lodged against him.
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> 9. The learned Sessions Court Judge erred in law by only considering and believing the evidence of the complainant (PW2), that DW1 and DW2 brought him into the CID office on 25.02.1997 and solicited RM5,000.00 from him, but without considering at all the evidence of DW1 and DW2 that they did not bring the complainant (PW2) into the CID office;

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> 10. The learned Sessions Court Judge erred in law by failing to give reason for believing every word of the complainant (PW2) and disbelieving all the words of the defence witnesses.

These grounds relate to the assessment of the evidence by the learned SCJ in coming to her findings. It is the contention of learned counsel for the b appellants that the learned SCJ did not consider adequately the evidence adduced by the prosecution and the defence before making her conclusions. It was pointed out that PW2 evidence should be viewed with suspicion as there were two traps laid and none of them succeeded.

c In reply learned deputy submitted that the learned SCJ had accepted the evidence of PW2 as credible. And that she had scrutinized the evidence as a whole before coming to her findings. As regards the immigration case learned deputy contended that it should not make the evidence of PW2 any lesser as the learned SCJ examined his evidence in totality with the rest of the evidence adduced.

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On these grounds I think it is the appellants' view that the evidence of PW2 should be disregarded due to his possible motive of revenge. There was no dispute that the appellants once apprehended PW2 for immigration matter. Such an approach might have worked if not for the fact that there were in fact other e corroborative evidence as discussed earlier to the assertion of PW2. And I agree with the learned SCJ that the mere arrest of PW2 before did not make his credibility doubtful per se.

As to the assessment of the evidence I think this court as an appellate court should be slow to interfere lest it may be taken as usurpation of the function f of the trial court. In the case of *Periasamy s/o Sinnappan & Anor v. Public Prosecutor (supra)* Gopal Sri Ram JCA said this at p. 580:

> …the appellate judge when rejecting the defence of the first appellant – which had been accepted as true by the sessions court – undertook his own assessment g of the first appellant as a witness, when he had not had the benefit of having observed him in the witness box; an advantage which the trial judge distinctly had. This is utterly wrong and smacks of an unwarranted usurpation by the appellate judge of a role that was strictly not his.

Thus, I also find no merit to the grounds as above.

h (iv) Ground 7

It reads:

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7. The learned Sessions Court Judge erred in law in ruling that the evidence of the 2nd accused (DW1) must be corroborated by evidence of other witnesses. The law on corroboration does not apply to the accused.

For this ground I think there was either a complete misreading of the judgment of the learned SCJ by learned counsel for the appellants or it was an attempt to mislead the court. No way do I find at p. 98 of the appeal record that the learned SCJ expected the evidence of the 2nd appellant to be corroborated by other defence witnesses. The closest sentence to the idea of corroboration is on the part where the learned SCJ discussed the issue of whether or not it was raining when PW2 was picked up. She said this:

> …DW1 had said it was raining then. This is not supported by any of the witnesses and also not by DW2.

Hence, there is nothing to suggest that the learned SCJ expected the defence version to be corroborated in order to cast a reasonable doubt on the prosecution case. I cannot help but to think that ground 7 was put in without a proper reading of the judgment or to cast as many grounds as possible in this appeal, a move which I think is a little unwise. Perhaps learned counsel may be reminded of the advice by Lord Templeman in the case of *Ashmore v. Corpn. of Lloyd's* (H.L.(E.)) [1992] 1 WLR. 446 at p. 454:

> It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249, 280, I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result.

It is therefore obvious that ground 7 has no merit whatsoever.

(v) Grounds 11 and 12

They read:

11. The learned Sessions Court Judge erred in law by accepting the explanation of the complainant (PW2) during re-examination that when he said "serentak' during cross-examination, he actually meant 'berturut-turut'.

12. The learned Session Court Judge erred in law by accepting hearsay evidence throughout the trial from the prosecution witnesses.

I will deal with these grounds simultaneously. For ground 11 it is in fact a repetition of the earlier complaint of the appellants that the learned SCJ accepted the evidence of PW2 including his subsequent explanation under re-examination. But I think I have already dealt with this aspect of the complaint in so far as it concerns the evidence of PW2. As noted above the learned SCJ did not err in accepting the testimony of the complainant PW2 after having considered it in the light of the other evidence adduced. What the learned counsel had done was to pick up pieces of discrepancies here and there with the hope that they may throw some doubts in the case as a whole. But I do not think he has succeeded in doing that. After all in any prosecution it is not all the time that evidence is found in chunk. They are often in strands and it is the combination of these strands twisted together that finally ties down or in appropriate case hangs an offender.

As for ground 12 it deals with the alleged admission of hearsay evidence, specifically exh. P.11, the repetition by PW2 of assertion made by PW3 to him and the repetition by PW4 of what was said to him by the 1st appellant.

I think I have already considered the status of exh. P.11 hereinabove. As for the repetitions made by PW2 and PW4 I do not think it can be said that such statements were hearsay per se. These witnesses were just narrating what they were personally told or heard or perceived. For instance, PW2 was just repeating what was told to him by his wife PW3 of a message she received from the 2nd appellant and what transpired while he was out. I do not think there is another way of presenting such information. And I do not think it can be said that it is hearsay when the same was heard or perceived by PW2. In any event I did not find in her judgment that the learned SCJ relied on those statements as the truth.

I make similar conclusion as regards the alleged repetition by PW4 of what was told by the 1st appellant to him.

There is therefore no basis in the complaint as contained in grounds 11 and 12.

(vi) Grounds 14, 15, 16 & 17

They read:

> 14. The learned Sessions Court Judge erred in law by failing to draw an adverse inferrence against the prosecution under Section 114(g) of the Evidence Act 1950 for not calling Mohd. Sakuna who was a material witness;

15. The learned Sessions Court Judge erred in law by failing to draw an adverse inferrence against the prosecution under Section 114(g) of the Evidence Act 1950 for not calling Ah Hing as a witness;

16. The learned Sessions Court Judge erred in law by failing to draw an adverse inferrence against the prosecution under Section 114(g) of the Evidence Act 1950 for not calling Radhakrishnan and Karuna as a witness;

17. The learned Sessions Court Judge erred in law by failing to draw an adverse inferrence against the prosecution under Section 114(g) of the Evidence Act 1950 for not calling police officers Azim and Bala as a witness.

On these grounds it was the contention of learned counsel for the appellants that the learned SCJ erred in not invoking s. 114(g) of the Act (*ie*, the adverse inference) when the prosecution failed to call certain crucial witnesses. The names of Mohd. Sakuna, Ah Hing, Radhakrishnan, Karuna, Azim and Bala were mentioned as witnesses who could have corroborated the evidence of PW2 one way or the other.

The learned deputy in his reply to these grounds argued that the finding of the learned SCJ was correct in that none of those mentioned could be considered as an important and material witness.

Now, firstly it should be understood that not in all cases of failure or omission to produce or adduce evidence that s. 114(g) of the Act could be invoked. Only in cases where there has been an intentional suppression of material or crucial evidence that the said section may be invoked. In the case of *Pendakwa Raya v. Mansor Mohd Rashid & Anor* [1996] 3 MLJ 560 this is what his Lordship Chong Siew Fai CJ (Sabah and Sarawak) at p. 578 had to say on the application of that section:

> Much had been canvassed before us respecting the drawing of adverse inference under s 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran. Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or a state of things (*ie*, Cholar introducing PW9 and was present at the meetings; Amran staying in room 'K') makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognized mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned.

Thus it depends on the facts and circumstances of each case and it is not of general rule that any failure or omission would attract the application of the said section. And it should also be remembered that the calling of witnesses in any prosecution is within the discretion of the public prosecutor. That was stated in the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 where Edgar Joseph Jr SCJ delivering the grounds of judgment of the court said this at p. 5:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.
>
> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194.) That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), *and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of Seneviratne v. R [1936] 3 All ER 36 at p 49, applied in R v. Nugent [1977] 3 All ER 662; [1977] 1 WLR 789*). (emphasis added).

In the instant case there was no complaint from learned counsel for the appellants that those persons named were not offered to the defence as witnesses at the close of the prosecution case. At p. 72 of the appeal record it is on record that the prosecution offered to the defence those that it did not wish to call as witnesses. But they were not accepted. And I do not think it can be said that the uncalled witnesses were 'essential to the unfolding of the narrative on which the prosecution case is based' as there was already the evidence of PW2, PW3, PW4 and PW5 to mention a few. Anyway I note that the basic complaint of the learned counsel for the appellants is that the testimonies of these persons could have corroborated the evidence of PW2. With respect I do not think it is the business of the defence to say how the prosecution should conduct its case. And if the defence had a hunch that these persons would have given evidence not favourable to the prosecution then they should have been accepted when offered. In so far as corroboration of the evidence of PW2 it has been dealt with earlier in this judgment.

I have also perused the finding of the learned SCJ (p. 99-100 of the appeal record) on the importance or role played by those persons in the episode when dealing with the issue of adverse inference raised at the trial. I do not think one can say that such finding is flawed.

Accordingly, these grounds also fail.

Conclusion

For the reasons stated herein above the appeal against convictions on all the charges preferred must therefore be dismissed.

Cross Appeal By The Prosecution

In its petition of appeal the prosecution stated that:

(i) the sentences imposed by the learned SCJ upon both the accused were too lenient and not appropriate to the offences committed;

(ii) the learned SCJ failed to take into account the seriousness of the offences committed in view of the fact that the accused were law enforcers; and

(iii) the learned SCJ failed to consider public interest when imposing the sentences upon the accused.

In contending that the sentences meted out by the learned SCJ were manifestly inadequate in the circumstances of the case the learned deputy said that corruption is a very serious offence. And the question of the accused committing the offence a second time should not arise as they would be dismissed from the police force due to their convictions.

For the accused learned counsel argued that the learned SCJ did not err in passing the sentences as she did. The applicable law when the offences were committed did not have any minimum custodial sentence. Further learned counsel pointed that the use of agent provocateur should be a mitigating factor in favour of the accused.

Having considered the arguments from both sides and the reasons given by the learned SCJ, I find that whilst she did state the reasons for the need of custodial sentence to be imposed the actual punishment handed down did not reflect the intended purpose. I do not think it can be of any deterrent effect if a mere one-week imprisonment is imposed. Further, it was ordered to run concurrently. In my view public interest should be taken into account when determining not only as to the nature of punishment to be imposed but also as to the length of custodial term if it is to be imposed. Here I find no actual consideration on that aspect by the learned SCJ though it may be implied from what was stated in her reason. But then again it can also be said that such references were merely paying 'lip service' to the need for deterrent sentence in view of the actual punishment imposed. As such this court, though an appellate court, should therefore be entitled to interfere in the sentences passed. (see: *Abu Bakar Alif v. R* [1953] MLJ 19; *R v. Ball* 35 Cr App R 164).

Accordingly, I therefore allow this cross-appeal against inadequacy of sentences passed upon the accused as I find the sentences imposed to be manifestly inadequate in the circumstances particularly on the fact that corruption is a serious offence. More so in this case where the offenders were supposed to enforce the law and not to take advantage of their positions. A clear message should be sent to those in similar position not to even consider doing the same unless they have the time to serve for the crime. I therefore set aside the term of the custodial sentences passed and substitute them with the following:

(1) For both the accused in respect of the 1st charge each of them is hereby sentenced to a term of three months imprisonment;

(2) For both the accused in respect of the 2nd charge each of them is hereby sentenced to a term of three months imprisonment;

The terms of imprisonment herein above are to run concurrently.

I affirmed the sentences of fine imposed on the respective accused in connection with their convictions on both the 1st and 2nd charges.

(3) For the accused Hamsan bin Hamid in respect of the 3rd charge I also set aside the term of imprisonment imposed by the learned SCJ and I hereby substitute it with a term of imprisonment of two months. This term is to run consecutive to the terms of imprisonment imposed in respect of the 1st and 2nd charges.

The sentence of fine imposed by the learned SCJ is also hereby affirmed.